

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

Implementation of Restructuring)	Docket No. 98-REN-NEW
Legislation (Public Utilities Code)	New Renewable Resources
Sections 381, 383.5 and 445)	Account
Account [AB 1890, SB 90]):)	
Renewables)	
<hr/>)	

RENEWABLES PROGRAM COMMITTEE MEETING on the
RECONSIDERATION of FUNDING AWARD DENIAL
under NOTICE of AUCTION 500-97-506

Friday, August 21, 1998

10:00 a.m.

Held at the:

California Energy Commission
1516 Ninth Street, Hearing Room A
Sacramento, California 95814-5512

Reported By:

George Palmer

COMMISSIONERS PRESENT

MICHAL C. MOORE, Presiding Member

JANANNE SHARPLESS, Second Member

STAFF PRESENT
(Alphabetically listed)

SUSAN GEFTER

GABE HERRERA

MARWAN MASRI

ROSELLA SHAPIRO

TIMOTHY TUTT

JENNIFER WILLIAMS

INDUSTRY PARTICIPANTS/PETITIONER REPRESENTATIVES PRESENT
(Alphabetically listed)

MARK G. JONES, Mark Technologies Corporation

PATRICIA Y. LEE, Mark Technologies Corporation

I N D E X

<u>Agenda Item</u>	<u>Page</u>
1. Welcome and introduction, Commissioner Moore:	4
2. Background to Petition, Commissioner Moore:	5
3. Review of Exhibits, Susan Gefter:	7
4. Exhibits 1 through 11 identified and admitted:	8 - 9
5. Petitioner's Position:	11
6. Staff's Position:	29
7. Petitioner's Rebuttal:	47
8. Staff's Rebuttal:	60
9. Closing Remarks by the Petitioner:	68
10. Closing Remarks by Staff:	69
11. Adjournment:	71
Reporter's Certificate:	72

Attachments to transcript, three letters dated August 20, August 20 and August 12, 1998 respectively, six pages total.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

Friday, August 21, 1998 10:00 o'clock a.m.

P R O C E E D I N G S

PRESIDING COMMISSIONER MOORE: Good morning. My name is Michal Moore. I am a Commissioner here at the Energy Commission. I am joined on the dais by my colleague Jan Sharpless, Commissioner and Second Member on the Renewables Committee. Also with us on the dais are Rosella Shapiro, Aide to Commissioner Sharpless; and our attorney Susan Gefter who is with the Office of the Hearing Advisor, a formal office here at the Energy Commission. She will be advising us.

At the front desk are our staff, Marwan Masri, our Project Manager; Gabe Herrera, our Attorney; Tim Tutt, who represents the Staff on special interests and conducted the auction for us; and Jennifer Williams who is the Secretary for the Division here.

With that let me open up. I have some procedural matters. And I assume the Petitioner will introduce himself to us in the course of this. Do you want to do it now? Okay. Fine.

MR. JONES: Good morning. I am Mark Jones from Mark Technologies Corporation in San Francisco, and I am representing the Bidder/Petitioner in this hearing.

MS. LEE: Yes. I am Patricia Lee, Vice President of Mark Technologies Corporation, here representing the Petitioner.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

PRESIDING COMMISSIONER MOORE: Welcome.

All right. Let me deal with some housekeeping here. And I need to read a couple of remarks into the record, so bear with me for just a moment.

In terms of background on this issue, in March of 1998 the Energy Commission released a Notice of Auction, or an NOA, to distribute funds from the New Renewable Resource Account. The NOA was amended in May of 1998 and results of the Auction were announced July 10, 1998.

The NOA described certain eligibility criteria, including demonstration of site control and project feasibility. Mark technology Corporation/Foras Energy, which we identify as the Petitioner in this matter, submitted a bid for its Alta Mesa Project, Phase V, but was deemed ineligible for funding because its bid did not show evidence of site control as required.

On July 24, 1998 the Petitioner filed a petition under our rules for reconsideration pursuant to the Commission's Guidelines for the Renewable Resources Trust Fund. The Petitioner requests that the Committee reconsider the basis for denying its bid.

In accordance with Chapter 6 of the Overall Guidelines and the Informal Hearing Procedures, which I presume the Petitioners have been made aware of, set forth in the Administrative Procedures Act, the Committee sent a Notice of this Hearing and a copy of the Petition to the individuals and

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

entities on the New Renewable Resources Account Distribution list. We know they received them, because we have gotten several letters in response.

In this Notice the Committee requested that the hearing participants and other interested members of the public submit written comments related to the Petition to this Commission and to the Petitioner by August 18, 1998. Comments were filed by Commission Staff by this date.

At the hearing today the Petitioner and the Commission Staff are identified as the parties to the matter and therefore the Committee will not rely on its Staff nor communicate with the Staff regarding the merits of the Petitioner's Request for Reconsideration. And that's the reason for the bifurcation with Mr. Herrera, who normally would sit with us.

Rather, the Committee will consider the evidence presented by both Petitioner and Staff and reach a conclusion solely based on the record that's presented here at this hearing.

So with that let me just remind you that the purpose of this hearing is to provide a public opportunity to discuss the issues raised in the Petition and to receive evidence from the parties in support of your position. If there aren't any objections to that, then we will receive the evidence today.

Are there any objections by anyone in the audience?

MR. HERRERA: We have no objection.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

PRESIDING COMMISSIONER MOORE: No objections from Staff.

And, Petitioners, do you agree to this procedure?

MR. JONES: Yes, we do.

PRESIDING COMMISSIONER MOORE: All right. Fine. With that I'd like to review the exhibits we have which include some new materials which have come to us. And I'm going to ask Ms. Gelter to review those for us.

MS. GELTER: And before we identify the exhibits, I wanted to know if there were any other individuals or entities in the audience today who would like to speak to the Committee during the course of the proceeding?

(No response.)

MS. GELTER: There's no one else present at this moment who would like to address the Committee today.

We did receive two separate comments from two different entities. They were unable to attend the hearing. I wanted to inform the Committee and the parties we did receive comments from CalWind Resources and we also received comments from the Waste Management Department of Riverside County.

Petitioner was given copies of these documents and also Staff received copies of the documents. We're going to ask that the reporter bind these comments into the record and they will be part of the transcript of this proceeding as if these individuals had attended the hearing and made the comments in

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

person.

I don't see the need to read the comments at this point into the record since everyone has copies. The Committee has copies, and the letters themselves will be part of the transcript.

With respect to the exhibits we will be looking at today, I'm going to identify them and then ask, if there are no objections, to have them admitted into the record.

Exhibit 1 is Mark Technologies/Foras Energy's Petition for Reconsideration which was filed on July 24th, 1998.

Exhibit 2 is a Notice of Auction from the Energy Commission, Number 500-97-506.

Exhibit 3 is the Notice of Auction, Addendum Number 1.

Exhibit 4 is a Notice of Auction, Addendum Number 2.

Exhibit 5 is a Notice of Auction Results, which were posted on the Commission's Web page.

Exhibit 6 is July 10th, 1998 letter informing Mark Technologies Corporation/Foras Energy, Incorporated of the Auction results.

Exhibit 7 is the Renewable Program Committee's Notice of Auction Results.

Exhibit 8 is a copy of Mark Technologies Corporation/Foras Energy, Inc.'s Alta Mesa Project, Phase V bid.

And Exhibit 9 is the August 18th, 1998 Declaration of Tim Tutt.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

Exhibit 10 is the Statement of Staff in response to Mark Technologies' Petition for Reconsideration.

And Exhibit 11 is the Petitioner's Rebuttal to Staff's Statement.

These 11 exhibits then will be considered the documentary record for this procedure. And, if there are no objections, the Committee will admit these into evidence.

Are there objections from Petitioner?

MS. LEE: No.

MS. GEFTER: Any objection from Staff?

MR. HERRERA: No.

MS. GEFTER: Then these exhibits are now admitted into the record and will be considered the documents on which we will base our decision.

(Agency Exhibits 1 through 11 admitted into the record.)

PRESIDING COMMISSIONER MOORE: Thank you, Ms. Gefter.

I should note for the record --

MR. HERRERA: Commissioner Moore, can I ask --

PRESIDING COMMISSIONER MOORE: Excuse me.

MR. HERRERA: -- that the Committee take judicial notice of a couple Guidelines, the Overall Guidelines and the New Account Guidelines which are referenced in Staff's Position.

PRESIDING COMMISSIONER MOORE: We will take reference and note of them. And they emanated from this

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

Committee in the first place, so we are not only aware but I think very knowledgeable about those.

Let me indicate for the record that on Exhibit 11, which is the Petitioner's Rebuttal to the Staff Position, this was received by us just prior to this meeting. And so other than that the Committee Members have had access to and the ability to read all of the exhibits that were present. So other than this, we are aware of every piece of correspondence that has been mentioned in the Petition list.

Let me outline the procedure that we intend to follow today so we don't miss a beat and so we also understand where everyone's response can come in.

First, we intend to entertain the Petitioner's presentation. Second, we will entertain the Staff presentation of their position. Third, we will open this to presentation from any other interested parties.

Next, we will have an opportunity for Petitioners to rebut what they have heard. We will have an opportunity following that for Staff to rebut. We will have an opportunity for final comments and Committee questions from the Members here, if there are any.

And with that I'm going to proceed straight in to ask the Petitioners to present their case.

MR. JONES: Thank you. Once again, I am Mark Jones with Mark Technologies Corporation, and I am representing the

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

Petitioner and the Bidder. There are no responses of Foras Energy, Inc. here today, but I am representing their interest collectively as the Bidders, just to clarify that for the record.

With respect to our presentation, I will keep my initial remarks brief because I believe our Petition sets forth fairly clearly our overall position.

Based on Mr. Moore's comments about being familiar with all of the exhibits, with the exception of the last one, which was just presented before the hearing, Petitioner's Rebuttal, I could either read that rebuttal into the record or wait until the Staff has presented their Position and present our Rebuttal at that time, if that's --

PRESIDING COMMISSIONER MOORE: That's probably the appropriate time to present it.

MR. JONES: Okay. At this point then I will simply summarize the Petition and the Position of the Petitioner, which is summarized in our July 24th document.

The key issue in this matter is that of site control and control of the proposed project location. And the comments in our Petition focus solely on that matter. Due to the letter we received with our Notice of Denial of our bid, that was the key item. And I have seen no information since that would lead us to believe there was any other matter that needs to be focused on except for the site control issue.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

Our Petition does summarize both the letter from the CEC denying our bid as well as, in summary fashion, setting forth the specific requirements of the Notice of Auction or so-called NOA pertaining to site control requirements as requirements of any bidder to submit its bid and address the site control issues pursuant to the NOA.

And on page 3 of our Petition, which is -- and, I'm sorry, I don't know these exhibits by number, but I think it's the first one, if I recall -- Exhibit 1 --

MR. HERRERA: Yes.

MR. JONES: -- on the third page of our Petition we summarize the bid requirements for site control under the NOA, which is NOA, Section IV C. And there are three specific items that were required of each bidder, and they are summarized on page 3 as items a), b) and c).

It is our overall Position that the Bidder complied in every respect with the conditions of the Notice of Auction and the requirements of the Notice of Auction for the presentation of a complete and proper bid submittal to the CEC.

The matter at hand here regarding site control focuses on what we call little b) on page 3. And I will read into the record these two sentences from b), because I think it is going to be the focus of this meeting and we might as well get it out on the table early, which is -- and this comes, again, out of NOA Section IV C, one of the requirements for site control

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

required, and I quote:

"The Bidder shall provide evidence that the location proposed can be used as proposed and is available to be owned or controlled by the Bidder or affiliated parties."

And as a footnote to the NOA, we have included the footnote which states:

"A contingent option to purchase or lease the location is sufficient for establishing ownership availability."

And I think there are several key words or phrases in here that we would like to emphasize, as the Bidder. First of all, that "The Bidder shall provide," the word "evidence," and I believe that our bid submittal provided adequate, adequate evidence.

It goes on to say that the "location... can be used as proposed." I believe there is, from a technical point of view, no question that our proposed location could be used as a wind-energy generating facility near Palm Springs, California.

The key word that I believe is the next one, which is the word "and is available." And the word "available," I think, is a requirement that we, as the Bidder, that -- we provided evidence of this availability through our Bid Submittal.

And I would like to turn now at this point to Exhibit 8, which is our Bid Submittal. And I'm not sure what page within the exhibit, unfortunately it's pretty thick, but it

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

looks like it's about maybe 15 pages into Exhibit 8. You will come across a letter from the U.S. Department of the Interior, the Bureau of Land Management. It's a letter to our permitting and environmental consultant, Mr. Anthony Skidmore, dated March 26, 1998, and is captioned as a "Decision" or a "Decision" Notice.

COMMISSIONER SHARPLESS: Is that the March 26th letter --

MR. JONES: Yes, it is.

COMMISSIONER SHARPLESS: -- that you're referring to?

MR. JONES: Yes. It sort of has a "March 26 1998" stamp right under the address for the BLM.

This letter, just as a little bit of background, this letter was written by BLM to Mark Technologies' consultant in March in response to a right-of-way application that we made to the BLM for installation of two renewable projects on BLM's land, known as Section 10, both a wind-energy conversion project, as well as a pump storage, hydroelectric project located partially on BLM land.

This Decision letter addresses both of those projects. But I think the key is the bottom of the first page where they discuss our wind-energy project. And I would like to read it into the record, just the operative sentence here that this matter turns on. And, once again, this was a response to an

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

application, what BLM calls a Form 299, which is -- I won't call it standard, but is a traditional application that is filed by parties who wish to use federal lands for private purposes.

And we filed a 299 asking that the BLM review our proposal to install alternative energy projects on this portion of BLM land. And in response to that the BLM wrote to us, and I quote, and I'm quoting from the bottom of page 1 of the March 26, letter:

"We have reviewed the project proposal as presented in the application and note the following:

"1) The following lands in the north half of Section 10, T[ownship]... S[outh], R[ange] 3" each, "SBBM" -- excuse me "R[ange] 3" -- "R[ange] 4 E[ast] SBBM are public lands available for a right-of-way for wind energy, subject to valid existing rights-of-ways."

And it goes on to list the legal description of the property.

I would like to emphasize the verb used there, the word is that the lands are "available." I think this letter from the BLM is, in fact, sufficient evidence, as required by the NOA Section IV C, that the proposed location, and the location is specified in the BLM letter, is available to be owned or controlled by the Bidder or affiliated parties.

This BLM letter goes on to state the specific

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

requirements the BLM would like submitted with a revised application, which are essentially: Environmental and landuse permitting matters that are traditionally filed with any detailed landuse application, either private or public lands, which include detailed engineering drawings which include grading plans and other pertinent engineering features of the site; and a complete plan of development and operations which they use as a basis to complete the environmental review for any proposed project; and some other information is listed on page 2, which, as we have said in our Petition, is what we'll call the landuse permitting process. A process that was fully anticipated to be a post-auction activity by any bidder, should they be successful in the CEC's auction, that permits were not required to be completed, but that the permits required were to be set forth in our application and here are the permit requirements from the BLM, including fees and other things that would need to be submitted.

To repeat my earlier summary: The Bidder and the Petitioner believe they have complied with the expressed and implied requirements of the NOA for site control;

And that maybe not anticipated or unintentionally, the Guidelines, as interpreted by the Staff through their rejection of our bid, effectively discriminate against projects, new projects, that do not have BLM-completed rights-of-way grant or a completed right-of-way grant on federal lands which require

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

the complete environmental review and traditional permitting process to be issued by the U.S. Department of the Interior;

And that the NOA required sufficient evidence. We provided sufficient evidence that the land was available and that the permitting requirements were set forth;

And for those reasons and for the other, perhaps more peripheral reasons set forth in our Petition, we feel the Staff's implementation of the Bid Guidelines was improper, that we, in fact, should have been a winning bid because it is my understanding that our bid price, the cents-per-kilowatt hour that we bid was not the criterion that was used for rejection. That we, in fact, had a lower bid than some of the other bidders who had been given conditional funding awards or conditional awards or a conditional bid acceptance, whatever you are calling them. So we believe the Staff should reconsider its findings for rejection of our bid in lieu of these specific items of evidence.

PRESIDING COMMISSIONER MOORE: Thank you, Mr. Jones.

Ms. Lee, do you have comments you would like to make?

MS. LEE: No, not at this time.

PRESIDING COMMISSIONER MOORE: All right. Before I proceed to Staff comments, Mr. Jones, I have just a couple of questions I would like to get clarified, and my colleague may have others, as well as our attorney.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

First, do you right now have an option on the land, a perfected option?

MR. JONES: The Bureau of Land Management does not issue options on federal land. They only issue right-of-way grants. And they only issue those following the completion of all the environmental reviews and normal permit processes.

PRESIDING COMMISSIONER MOORE: Okay. I assume that includes the concept of a lease as well. There is no perfected lease at this time?

MR. JONES: There is no lease available, only a right-of-way grant on federal lands.

PRESIDING COMMISSIONER MOORE: My next question has to do with the word "available." You have put some measure of hope in an interpretation of the word "available." And what I'd like to ask, just so that I can clarify this for my own mind, is how we might interpret the word "available" in a real context of being able to grant an award. So let me pose a hypothetical case for you.

You're in the market for a new suit of clothes, and I'm a haberdasher and I have a store that you visit. I have a suit of clothes in the window. Would you agree that suit of clothes is available for purchase by you? I'm advertising and I'm making that available.

MR. JONES: Well, yes, without any prejudice to try to make a connection to clothes versus a right-of-way grant.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

But if a suit is in the window of a retail store, it doesn't require a permit to buy the suit or an environmental clearance to buy the suit, I suppose that one would consider that to be available to be purchased if you went in the store and met the conditions provided by the proprietor.

PRESIDING COMMISSIONER MOORE: "...met the conditions." But since you haven't, you don't control that suit; is that correct? I mean right now it's available, but you don't control it. I'm trying to make an analogy that suggests what's available is different than what's controlled.

And in the end, the Committee is going to have to pursue a line of reasoning that will allow us to come to a conclusion that the successful bidders control access to something, not that they have the potential to control it but that they control it.

And so I'm just trying to differentiate between what's "available" and what's controlled.

MR. JONES: Yes. I would like to state that we have, I think, no disagreement that the word "control" and "available" are two different concepts.

PRESIDING COMMISSIONER MOORE: Jan.

COMMISSIONER SHARPLESS: Yes. I think I don't want to pursue too much a line of questioning until the Staff puts its presentation out as well, but I would like to ask one question.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

And that has to do with the form itself, the CEC 1890 B-2, the one that's the site control form, the one that you made out, the one the Guidelines says you must provide all available material to answer these questions.

And in the list, in B Section on that list, it says, "Check the appropriate box." And then under that it has, "Ownership interest in the project location. Leasehold interest in the project location. Exclusive and irrevocable option to obtain ownership or leasehold of project location."

Now apparently people who are interested in the auction pored over the Guidelines and the forms. And when they had questions about whether or not their project might or might not qualify, they would come to these pre-bid conferences and they would ask questions about what would be eligible and what would be not eligible.

So there was an opportunity, a couple of opportunities, that allowed people to ask questions if, in fact, there might be something that didn't quite square with what your application might include and what was in the Guidelines or what was in the forms.

Did you consider perhaps there might have been a problem there and perhaps you needed to get clarification on these issues? Did that ever occur to you, ever?

MR. JONES: When you say "these issues," what specific issues are you referring to?

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

COMMISSIONER SHARPLESS: The issue that when you go for an application or when you go for a permit on BLM property, that that permit requires a process that might be longer than what would be available to provide the type of information that would be included in what the Commission was looking for.

So the issues that you bring up today about the discrimination, perhaps, of these Guidelines or these forms against a party who might want to locate on a Bureau of Land Management property might be somewhat in conflict or there might be an issue there you might want to clarify with the Commission before you pursued it?

Did that ever occur to you?

MR. JONES: In this particular matter of whether site control requirements of the NOA required clarification, we felt the NOA was very clear about "that is available to be controlled." We didn't feel that itself was an issue --

COMMISSIONER SHARPLESS: So the form didn't create any special question in your mind that trying to do B-1 might not exactly fit with your project?

MR. JONES: Well, I think, and I'm speculating a little bit what was going through our minds, but if what you're saying is that we would have had -- we were confronted with having to check one of three boxes.

COMMISSIONER SHARPLESS: Yes.

MR. JONES: And confronting with checking one of

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

three boxes, we elected to check item 3 and put a notation, as you can see in our bid, "See B-2 below."

COMMISSIONER SHARPLESS: Right.

MR. JONES: The obvious thought process would be that no BLM project, because even with a right-of-way grant that's been issued to a project, would be eligible under these Guidelines, because even if one had been granted to us they wouldn't apply to 1, 2 or 3 or either of these three boxes.

And so clearly we felt that -- like I said earlier, maybe unintentionally, maybe there was a fourth box left off here -- that there may be a real property site control issue that perhaps the Staff didn't consider but that the NOA Guidelines were "available to be controlled." That was the operative phrase in the Guidelines itself.

And so without getting into semantics, since the BLM doesn't do any of those, we clarified it by the bid.

COMMISSIONER SHARPLESS: So your response to me was you felt even though your project didn't fall within one of those boxes that the Guidelines within the NOA were clear in your mind as to what "available" meant; even though I'm sure you probably have seen that when the NOA went out and when pre-conferences occurred that there were long lists of questions about what the requirements actually did and did not require. So there was much clarification that occurred after the NOA came out that were in the form of questions and answers; situations

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

that could not have been perceived perhaps at the time, that every situation could have been perceived at the time that Guidelines were put out. Of course, we have had multiple public processes.

And I know it's difficult for all business people to sit through lengthy public processes. But it was an attempt, I think by this Commission, to provide as much openness into what the intention of the Commission was in the Auction, in the New Renewable Auction.

So what I'm really asking you here, because I know the Staff is going to present their case, was what was in your mind when you saw this form and when you compared it to the NOA and when you saw the multitude of questions and answers that were circulating regarding the NOA.

MR. JONES: Well, there's several questions and issues in your comments there, but I'll try to address some of them.

Number one is just to clear the air a little bit. We have no criticism or in any way are alluding to the fact that perhaps the Commission wasn't open and available and tried to have available the forum to have perhaps ambiguities and things cleared up in its Auction.

Despite what was represented by the Staff's Position Paper, the Petitioner did attend one of the pre-bid conferences. Why we weren't on the list when we did sign in, so it may have

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

been a whole other list somewhere that got lost, but we were at one of the pre-bid conferences --

COMMISSIONER SHARPLESS: I saw that in your comments. I'll note that.

MR. JONES: And we listened carefully for all the issues, including site control. And there's quite a few requirements of this Auction that were required of any bidder. And so we had multiple interests beyond site control.

And following, though, that pre-bid conference we did carefully review the question-and-answer documentation that was issued by the Commission. In no place did we see that the intent of the Commission's NOA was to preclude federal lands from being used for projects. I mean we never got even a minor inkling that that was your expressed or implied or even subconscious intention, was to "We only want projects that are on private land that have private options and in private leaseholds. And don't even come to us with a viable otherwise qualified project, complete with the bid bond and," what turned out to be "a winning cents-per-kilowatt bid if it's located on public lands." We didn't receive any indication that that was the intention of the Commission --

COMMISSIONER SHARPLESS: But you did not ask that question?

MR. JONES: I don't think we felt that it was a question. We felt the NOA was very clear, that the project site

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

was available to be controlled by the bidder and you required evidence that it was available to be controlled by the bidder. And we provided that evidence. And we think the evidence is very clear, that it was available to be controlled by the bidder. We think we complied. We don't think there was a gray area.

COMMISSIONER SHARPLESS: Fine.

PRESIDING COMMISSIONER MOORE: Thank you.

I have one other question, and that concerns the letter, the March 26 letter from the Bureau of Land Management. On page 2 of their letter they say, "BLM requires the following additional information to completely evaluate your application," a) through e).

Did you pursue or begin those? Is there a trail that says, okay, we're this far on a) and we've submitted b), et cetera? What have you done in response to this requirement of additional information from BLM?

MR. JONES: Unfortunately, that's a somewhat complicated question because there are two projects wrapped into this Decision letter, but I will try and just focus on the wind-energy component.

The main thing that is required here from the BLM and requires a lot of work is the plan of operations and the detailed engineering drawings. They wanted to have grading plans and detailed location drawings for all structures and

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

equipment on federal property with the application. That's item e). And we went and clarified this with BLM staff after receipt of the letter.

We have commenced -- we did all the engineering to have that done. We have updated our site plan. We have contracted the civil engineer. We are proceeding with completion of all these items and submittal of a complete bid package to BLM.

We have been in contact with them probably several times a week since this letter on both this project and our pump storage project, which actually is a more complex issue with respect to submittal of these matters because of the civil engineering work involved. But we have proceeded.

We are going to file, as requested by BLM, two separate applications; one for the pump storage project. I think that's indicated at the bottom of page 2 there.

And we have completed a full application to the FERC, which was submitted which required a lot of detailed engineering work. That submittal has been made to Washington. And we are proceeding with what is a slightly less intensive but, nevertheless, a significant effort to complete the balance of these matters for the wind project. And we expect to have these submitted to the BLM with all their fees, et cetera, sometime within the month of September.

PRESIDING COMMISSIONER MOORE: Okay. So it's fair to summarize your answer as: We are proceeding to address this,

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

but there is not a submittal that has been made at this point?

MR. JONES: There has not been a submittal made at this point. One is in process, however.

PRESIDING COMMISSIONER MOORE: Ms. Gefter.

MS. GEFTER: I have just a clarification about the locations of the land and which project which location refers to, because at the bottom of page 1 you list several different areas. And you're talking about two projects.

Were the projects to be built in the same location, or did you have separate areas?

MR. JONES: The projects in toto involve private and public lands. The wind-energy project, Phase V, that was the subject of this bid is located on federal land only. The wind turbines themselves are located on federal land.

Interconnection facilities and high-voltage lines to the interconnect in that area will run on private land offsite. But primarily that's on the BLM land.

The pump storage project is somewhat on BLM land and has substantial facilities on private land that surround Section 10.

MS. GEFTER: Are there some areas where both your wind project and your hydroelectric project are on the same plot of land?

MR. JONES: The same plot?

MS. GEFTER: Or the same area, I mean --

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

MR. JONES: Yes. Section 10 BLM land is approximately two-thirds of a section, "a section" being a square mile of real property. This is -- the section in question here that is the subject of this letter from the BLM is essentially the two-thirds or the northerly two-thirds of Section 10 owned by BLM. It is private land entirely surrounding the BLM parcel. So BLM is sort of land-locked in the middle there, which is why you have private land use for some of the ancillary facilities for the project.

Our Phase IV project, which was accepted in this new technology program, is the section of land adjacent to this, immediately to the north.

PRESIDING COMMISSIONER MOORE: Thank you very much.

With that I'm going to turn to Staff and ask for a summary of your Position.

MR. HERRERA: Thank you, Commissioner Moore. I will be giving Staff's Position, a summarizing Position, although Tim Tutt and Marwan Masri might interject and might have additional comments after I'm through. And they will be available, of course, to answer any questions. And, if they have some questions to pose, they would like to pose them as well.

We have reviewed Staff's Petition and we think it's completely without merit and it should be rejected. But before I turn to the points why, let me just --

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

COMMISSIONER SHARPLESS: The Applicant's Petition?
You mean the Applicant's Petition?

MR. HERRERA: I misspoke --

COMMISSIONER SHARPLESS: Yes.

MR. HERRERA: -- if I said -- yes, Petitioner's
Petition.

Just a couple of points concerning the process of the Auction itself because I think it was conducted in a fairly open process, and we certainly encouraged individuals to come forward to ask questions. Certainly when you're drafting a document like this, you can't think of every situation. And so that's why it was important for us to go out, ask for questions; conduct two pre-bid conferences, one here in Sacramento, one in Los Angeles. We encouraged everybody to attend. The Bidder, in fact, did attend.

We then summarized any of the questions posed and responded to those questions and provided our responses to all the bidders, and I think Petitioner, as well, received those. So it was fairly open. And I don't think we were trying to hide the ball.

Again, we were trying to encourage participation. And we wanted the bidders, the prospective bidders, to be informed of what was required of them and the consequences of what would happen to them if they didn't provide the information we required.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

Let me go over the four points we raise in our Position, and I'll summarize the first, and then I'll go back and add a little detail to each of them.

First of all, I think the NOA was conducted fairly, in accordance with what we said in the NOA document. I think we gave everybody an ample opportunity to ask any questions, and certainly a lot of people and a lot of bidders did.

And we applied the requirements in the NOA uniformly to everybody, irrespective of where their project was located, whether on state, federal or private lands and whether hydroelectric or wind or geothermal. We just applied the standards uniformly, and that makes sense. And you need to do that when you have a public auction, a public solicitation.

Second, the Petitioner failed to demonstrate site control, notwithstanding what we thought was pretty clear information in the Notice of Auction that indicated what they had to provide to substantiate site control.

Again, we were looking for some legal interest in the property so that the project could move forward. We wanted serious, viable projects. We didn't want projects that were likely to fail in six months or a year because that would mean we would have to repeat the whole process and award money again, and that would have been a waste of Staff's time.

Third, I think if we accept Staff's changes -- Petitioner's proposed changes, what we're doing is we're

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

changing the rules of the Auction after the Auction has already been held. And I think that's a little unfair to those individuals who complied with the rules, who demonstrated site control and who got conditional awards, because it's unfair. They played by the rules; they should get the benefits of participating in the Auction fairly and fully.

Fourthly, I think if we do accept Petitioner's argument it may provide a legal argument for them later down the line, if they fail to meet one of the milestones, and that is because if they miss milestone number one they could put their bid bond at risk.

And if we're informed of anticipated delays in advance it might not be so unreasonable to think those delays will occur and therefore limit our actions on the bid bond.

Now let me just touch on a couple points we had and we made in the Notice of Auction, which I think made it very clear to all the bidders what was required of them. And I will ask you to turn to page 10 in Exhibit 2, which is the Notice of Auction.

And what I did was I went through and I highlighted those pages that actually included some text that spoke about site control and what was required.

Page 10 on the top: Each bidder "must include required information, using the forms provided... [in the] attachments... [of] this Notice of Auction." Later on in the paragraph: "Bids

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

that do not include this information will be disqualified."

In Section C. Mandatory Information: "You must complete CEC-1890B-1 (Bid Form," and it goes on to say, "CEC-1890B-2 (Site Control... Feasibility...) Attachment... to the Site Control and Feasibility form must also be provided as directed. All information must be completed in [its] entirety." It goes on to say: "in order for the bidder to possibly win... the auction."

Turn to page 14, under "Demonstration of Site Control and Project Feasibility." Midway through the first paragraph: "The bidder shall provide evidence that the location proposed can be used as proposed and is available to be owned or controlled by the bidder or affiliated parties." There's a footnote that references "contingent option[s] to purchase or lease the location is sufficient."

If you to turn page 15, Rule Number 1, "To be eligible for consideration, bids must be sealed, delivered to the location... by the date and time identified," la-la-la "and must contain all required bid information as identified in Section IV," which is the Mandatory Bid Information required.

Finally, if you turn to page C-3, which is one of the attachments, and it is in the Site Control and Feasibility Form, we identify that the bidder needs to attach to the form information that demonstrates he has either an ownership interest, a leasehold interest or an exclusive and irrevocable

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

option to obtain ownership.

MR. TUTT: You used the wrong page number there, C-3. It's 3-1.

MR. HERRERA: 3-1? I apologize.

Anyway, I think these statements are pretty clear. What we were looking for is --

COMMISSIONER SHARPLESS: Could you get closer to the microphone?

MR. HERRERA: What we were looking for was the bidder's available to --

COMMISSIONER SHARPLESS: I think the whole system is off. Maybe that's -- it's not my ears. The system's gone.

MR. JONES: Yes, I think mine's gone, too.

COMMISSIONER SHARPLESS: Curtailment.

Just speak up a little bit, Gabe.

MR. HERRERA: I think it's pretty clear from these statements what we were wanting bidders to provide was information that demonstrated they had a legal right to use the land as proposed.

Now the Petitioner argues that they had this, that they demonstrated that. But clearly there has to be something more than just a mere application to BLM. It has to be more, some sort of positive response that indicates that they can move forward with some sort of security knowing that the land will be available if they successfully complete their application

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

process. We didn't see any of that. And as far as I know, nothing was produced to indicate that.

Concerning the discrimination issue, we applied the standards uniformly. It didn't matter where the project was located. We wanted bidders to come forward with information that demonstrated site control.

Now had we known in advance that BLM might require something more, perhaps we could have included something. We didn't. And we certainly gave everybody an opportunity to inform us of that in advance. No one did, including Petitioner.

I think, with respect to the hurdles that may be unique to a given project, I think there could be a number of applicants who argue that what they had to do in order to secure site control for their proposed project was a little bit different than, say, what Petitioner had to do or somebody else had to do. But those were unique to that given project. And I think Petitioner here had the burden of satisfying those hurdles, getting over them and providing the information so that we knew site control was available and secured by them.

When you look at Bidder's submission, what you find is they didn't demonstrate site control, they didn't provide an ownership interest or proof of it, or leasehold, or an exclusive and irrevocable option. At best what they demonstrated to us is that they had some interest in securing site control, but they never perfected that interest by moving forward with a BLM

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

application.

If you turn to their attachment to the CEC Form on site control, so turn to the same document that Mr. Jones was referencing, the letter from BLM, what I see here is I see --

COMMISSIONER SHARPLESS: Excuse me. Which document are you referring to?

MR. HERRERA: The March 26, 1998 letter.

COMMISSIONER SHARPLESS: Oh, okey-dokey.

MR. HERRERA: It's included as part of Exhibit Number 8.

COMMISSIONER SHARPLESS: Right.

MR. HERRERA: That would be Petitioner's bid. What you see here is a general response that tells Petitioner, or it could tell any individual what would be required of them if they wanted to apply and secure a right-of-way grant from BLM. It doesn't indicate that Petitioner had any given right to move forward. In fact, it suggests that they needed to provide additional information and pay a processing fee in order for BLM even to start the process. That can't be confused with site control because clearly they have no legal right.

I mean if you want to look back to the hypo Commission Moore just posed about the suit in the store, it seems to me that BLM must have some sort of process that's likened to a layaway process so that they're aware and they're secure that we don't have two competing parties applying for the same plot of

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

land.

We have a general letter from BLM saying you have to do X, Y, Z if you want to move forward. Petitioner acknowledges they didn't do that. And they certainly didn't provide evidence of it in their bid submission. And so I'm assuming they didn't receive anything from BLM indicating they had the secure right to move forward.

Concerning the issue of site control on BLM land, Tim Tutt contacted the BLM branch manager. I believe her name is Lucia Kuizon. And she confirmed that they did not possess any legal rights to use that property as proposed, and indicated that at that point in time when Tim contacted her that they had withdrawn their application.

MS. GEFTER: You're referring to Exhibit 9, which is the Declaration of Tim Tutt?

MR. HERRERA: That's correct. I am.

MS. GEFTER: Is that Declaration signed under penalty of perjury?

MR. HERRERA: Yes, that's correct. And Tim Tutt, he can speak to his conversations with BLM and the fact that Petitioner's application was withdrawn.

And I think their Position might be more credible, although I don't think it's legally sufficient, if they came forward and they said, "Yes, we had applied to BLM and we moved forward. We submitted all the information. We paid all the

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

fees. And our application is currently being processed." They did not.

Thirdly, I think it's important to note, if we accept their Petition, we're changing the rules. It's going to be unfair to people like CalWind, to White Water Energy and to the County of Riverside that did comply fully and provided evidence of site control and were awarded a conditional award. These individuals played by the rules. They should benefit from the Auction.

I think also there could be a legal challenge from those individuals that would have participated in the program had they known they didn't need to secure sufficient site control as Petitioner maintains. I think they have a very strong case in arguing that our process is flawed because of that and will challenge the whole Auction process, which could cause us to invalidate all the awards if we move forward on what Petitioner seeks.

Lastly, I think the issue of our action on a bid bond, we're on notice; the Commission is on notice that this project is likely to be delayed, that it possibly could meet milestone number one. It would seem unreasonable, their knowing that information, for us to take any action when the times comes if they do fail to meet milestone number one.

Because of these reasons I think their Petition should not be sustained.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

PRESIDING COMMISSIONER MOORE: Thank you.

Mr. Tutt, do you want to amplify any of the remarks you submitted in the statement?

MR. TUTT: I'll say a few things. With regards to my declaration, first, I did have conversations with Lucia Kuizon and with Ms. Patricia Lee about the proposed project. And, in particular, one reason I was talking to Ms. Kuizon was --

MS. GEFTER: Excuse me, Mr. Tutt. Could you identify who Ms. Kuizon is?

MR. TUTT: Ms. Lucia Kuizon is a branch manager or area manager at the Bureau of Land Management. She works in the office the Petitioner would have applied and did apply for a right-of-way grant from BLM.

Ms. Kuizon informed me that the Petitioner had not achieved site control in her mind. I tried to elicit some idea of whether someone else could come in and use the property. And she said it's possible that someone could. They did not have site control. They could take another application if someone did submit it.

PRESIDING COMMISSIONER MOORE: They didn't have an application on file, but they could accept one?

MR. TUTT: That's correct.

And she indicated, and this is the word that I remember her using, that the Petitioner had "withdrawn" their

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

application. I don't know that there was anything informal in the sense of any written document of withdrawing. It just seemed like a case of when the application was on hold because of the logistics of both the projects, that the private project, Alta Mesa Phase IV, and this project that we're discussing, going forward at different times and with different environmental reviews because of the private and the BLM nature of this project.

I would note that, in reviewing Petitioner's bid, I was looking carefully at the BLM letter. There is an item on page 3 of that letter, midway down the page, which suggests that "The above information," the long description of information the bidder would have to submit, "and an application fee should be submitted within 30 days of receipt of... [the] decision," which was March 26, 1998, I believe, that's the date that they sent it out, perhaps, "or your application is subject to rejection."

I mean that doesn't imply necessarily that BLM would reject the application, just that they're giving them a time period with which to respond to this Decision letter.

And I confirmed with Ms. Kuizon that there was no formal response within that 30-day period or any request for an extension of that 30-day period.

PRESIDING COMMISSIONER MOORE: And that 30-day period, the end of that 30-day period fell before the bids were due here?

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

MR. TUTT: That's correct. It would have fallen, I presume, sometime in April, depending on the exact date of receipt of the Decision from BLM.

PRESIDING COMMISSIONER MOORE: And, just for clarification, those bids were due to us by?

MR. TUTT: June 5th.

PRESIDING COMMISSIONER MOORE: Thank you.

MR. TUTT: I would note, as Mr. Herrera has suggested, in going through and developing a complex auction process and Notice of Auction, we could not anticipate everything. There was ample time to -- or opportunity to ask questions and clarify things.

One thing, as Petitioner has pointed out, that we may not have considered explicitly is how does this particular issue of site control apply to Bureau of Land Management lands or properties, we did receive -- contrary to Petitioner's statement here today, that projects on public lands could not participate in the Auction -- we did receive several other proposed projects on BLM property. Those projects had approved right-of-way grants.

In some cases those approvals were subject to -- were received prior to the Auction and required some movement by the Petitioners or they would face the same kind of rejection or potential rejection Petitioners.

And in those cases we confirmed with the applicants

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

that they did file extension letters with the BLM and did pay bond fees for turbines as part of those extension letters. And in those cases, although I think Petitioners could have interpreted this differently, depending on -- I'm sorry -- bidders could have interpreted this differently, depending on how they were looking at their individual projects. The bidders in those cases indicated that their granted right-of-way was a leasehold interest in the property.

And it is my general understanding, when BLM does a right-of-way grant, that does involve a lease payment of some sort.

So that's the sum of the additional information I have here today.

PRESIDING COMMISSIONER MOORE: Thank you.

MS. GEFTER: I have just one question on that last issue. Could you compare the description of ownership in the projects where they did have a right-of-way grant from BLM compared with Petitioner's proposal?

MR. TUTT: Yes. The projects which did have a right-of-way grant from BLM had a decision from BLM indicating that BLM had granted their right to use the property in those particular projects as outlined in those proponents' applications to BLM.

In other words, those projects had gone farther in the process, whatever their individual timing requirements were,

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

they had gone farther in the process than the Petitioner's project in dealing with BLM and had actually achieved a right-of-way grant -- decision from BLM indicating BLM had given them the right to use the property as they proposed.

And that, in my mind, and again, as I say, my general understanding is that would involve some sort of lease from BLM, that the property was being used and some sort of payment.

And the bidders in those cases indicated they had a leasehold interest on their site control and feasibility forms when they submitted their bids.

MS. GEFTER: Did they submit letters from BLM that said they had the leasehold interest?

MR. TUTT: They submitted letters from BLM saying they had right-of-way grant applications.

MS. GEFTER: Right-of-way grant applications or --

MR. TUTT: I'm sorry. Right-of-way grant decisions.

PRESIDING COMMISSIONER MOORE: Thank you.
Commissioner Sharpless.

COMMISSIONER SHARPLESS: Yes. Mr. Tutt, I wanted to ask you the motivation of contacting the Bureau of Land Management when you started reviewing this applicant's information package.

Was it the section in the March 26th letter that said within 30 days of receipt, the applicant would need to submit further information, or possibly be rejected; is that what

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

caused you -- what was your thinking in contacting BLM in this case?

MR. TUTT: I was contacting BLM in this case in an attempt to clarify the issue of site control for this project.

COMMISSIONER SHARPLESS: It was not clear with the information they provided you that there was site control?

MR. TUTT: It was not clear to me that there was site control. I guess my first -- I contacted BLM in an attempt to clarify whether there was or was not site control. And I had gone through the letter and seen that they did not get a grant, right-of-way grant, but in fact BLM had asked them for substantial additional information and processing fees before, and a completed application before they would proceed further on the case.

I noted the 30-days' requirement in the letter. That was one of the things I was inquiring about, was whether there was an extension requested by the Petitioner for further time to prepare an application. And there was not an extension, according to the people at BLM, that was requested for this particular project.

COMMISSIONER SHARPLESS: Okay. At what point in time did you find out, because the applicant sent you information that said they had asked for an extension. There is a copy of their letter in our booklet that asks for a 60-day extension.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

At what point in time did you find out, and I think that this is also in your Exhibit...

PRESIDING COMMISSIONER MOORE: Declaration 9.

COMMISSIONER SHARPLESS: ...9, Declaration 9, that you later found out that the application extension was not for this project? At what point in time did you find that out, and verify it?

MR. TUTT: I found that out on -- according to my notes, which I trust are accurate, on July 7th when I called Lucia Kuizon again, because I had been -- I believe at that point, although it's not in my notes, that Ms. Lee had informed me there was an extension that they were applying for. But Ms. Kuizon informed me it was not for the project we are discussing today, Alta Mesa Phase V. It was for a separate grant of right-of-way for access roads on existing or other sites.

COMMISSIONER SHARPLESS: So at the time that this project was denied there was not an application letter in to BLM officially doing anything with this site; is that correct?

MR. TUTT: That is my belief, yes.

COMMISSIONER SHARPLESS: Thank you.

MS. GEFTER: Just following up again on the right-of-way grant from BLM that you saw in other applications, and then in this particular application you saw this letter which was called a decision but also indicated several other steps that needed to be taken. Was this the particular item

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

that got your attention to distinguish this case from the other cases where you had BLM right-of-ways?

MR. TUTT: It was one of the items. This certainly was a different feel or sort of letter than I had seen in the other applications. Those other letters generally suggested -- they were a decision letter that said, "We received your application for right-of-way grant and a decision hereby is to grant your application."

And in some cases it was granted contingent on them moving forward within a couple of months or getting an extension on that. But they did receive a grant that says, "We grant you right-of-way for this particular proposal you have provided to us."

In addition, in the site control and feasibility form itself for the Petitioner's project, they indicate where we ask them to check which box they had site control under, whether it was an ownership interest, a leasehold interest or the third box is --

COMMISSIONER SHARPLESS: The option.

MR. TUTT: -- exclusive and irrevocable option to obtain ownership. This was another thing that caused me some concern, a question about site control, because the Bidder did check that third box, but then in their note they indicated they did not have that exclusive and irrevocable option because BLM does not do that, according to the Bidder.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

So I had some difficulty understanding exactly how their site control then was clear from the bid that we received.

PRESIDING COMMISSIONER MOORE: Thank you, Mr. Tutt. Thank you to the Staff.

I'm going to turn back to the Petitioner and ask them if they would like to offer us a rebut for any of the comments that are presented in Staff's remarks.

MR. JONES: Yes, we would. I'm trying to collect my thoughts a little bit here. There were quite a few issues that were raised by the Staff. I will start with some of my notes, and then I will go to briefly review the written rebuttal that we provided at the beginning of the hearing.

There seems to be a lot of confusion about BLM right-of-way grants. And since we've been working with the BLM for many, many years, I might be able to shed a little bit of light on this. I am, of course, not privy to what the other bid packages to which Mr. Tutt refers contain. I haven't seen them; I don't know what's in them. But he's indicating they contain some sort of a decision letter and they contain a right-of-way grant.

Well, those two things are totally different documents. And we have provided in our bid submittal and are included in Exhibit 8 what a right-of-way grant looks like. It does not look like what Mr. Tutt is saying it looks like, which is a decision letter that says "You've got 60 days to ask for an

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

extension," et cetera, et cetera.

A BLM right-of-way grant -- and we have given you an example and it is in the binder, I believe. It's at the end of Exhibit Number 8. I think it's the last complete document in Exhibit 8, the last 10 pages or so.

And you will see this is a document issued by BLM for -- out of the Desert Office, which is the same office that would be issuing a right-of-way grant for our Phase V project.

And you will see that a BLM right-of-way grant is a document that contains detailed terms and conditions for the use of federal lands. And it goes through the date that it is effective and how you will follow codes and liability.

I won't go through the whole right-of-way grant, but it is not a decision letter. A BLM issued right-of-way grant is another animal all together. And it requires the completion of all environmental and technical reviews required by BLM for it to be issued.

Secondly, I'd like to point out, and this is confirmed by the sample grant that's in our bid, a right-of-way grant is not a lease. You will see right here that the nature of interest, it's "receives a right to construct, operate, maintain, and terminate a[(n)] wind energy facility on public lands." And "any right-of-way grant is hereby granted pursuant to Title 5 of the Federal Land Policy and Management Act of 1976."

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

I'm not a lawyer, so I'm not going to even begin to try and interpret what's in the Federal Land Policy Act. But this document is clearly a right-of-way interest that grants certain rights to the grantee. And he maintains, he or she, the entity maintains these rights for a period of years subject to specific terms and conditions. And --

MS. GEFTER: Where are you reading this from?

MR. JONES: I'm reading from the first page of the Right-of-Way Grant. It's in the binder, Exhibit Number 8. It's the very first page of the Right-of-Way Grant, Form 2800-14, August 1985. And that page is what I call the summary page. And then attached to it is more general terms and conditions the BLM issues for its right-of-way grants.

PRESIDING COMMISSIONER MOORE: Just so we're clear on this, the one you've submitted to us is a sample. You don't own one of these for this project?

MR. JONES: That's correct. This was required by the Auction requirements to demonstrate or provide a sample permit by the agency in question that shows that agency issues permits. I'm not quite sure of the language that's in the Notice of Auction, but this was intended to fulfill that requirement.

PRESIDING COMMISSIONER MOORE: So if your project had a perfected grant, it would look like this?

MR. JONES: It would look like that. At the end, if you succeed in having it granted, you will get one like this.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

And just to complete a few other questions that came up during the Staff Presentation, with respect to the other bidders that apparently have -- and now I'm just assuming what they have is decision letters and not right-of-way grants which, stated by Mr. Tutt, if that is what they have, he went on to say, and I believe counsel went on to say, that you need to go check the appropriate box on the Site Control Form.

And I'm going back to the question raised by the Commissioner earlier, which is you need to check one of these boxes.

And there seems to be a contradictory application of their own Auction rules. On the one hand, they say you must check one of these boxes and you must have -- and I'll read the boxes to you if I need to, we all know what they say -- you need to have an ownership interest, you need to have a lease or you need to have an option for a lease or ownership interest.

It appears as if the Staff has accepted bids -- based on the testimony I just heard -- has accepted bids based on a conditional decision letter. That is not -- that means that all three of those boxes don't apply, yet you have granted conditional funding awards to those projects.

So there seems to be an uneven handling of your own rules, because these --

PRESIDING COMMISSIONER MOORE: It seems to be on a timer.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

(Comments off the record about the public address system.)

MR. JONES: Either that or now I know what issues not to talk any further about, to stop. I can talk a little bit louder in the meantime. I'm sure everybody can hear me.

PRESIDING COMMISSIONER MOORE: You're still being recorded.

MR. JONES: Okay.

PRESIDING COMMISSIONER MOORE: That's that microphone over there, so that's still picking you up.

MR. JONES: Just to summarize that point, if there's some criticism of us not checking off one of those boxes because we had only a conditional decision letter, it appears you have accepted bids as winning bids with conditional decision letters that, by your own admission, should not have been accepted because they didn't provide an ownership interest, a leasehold or an option.

So I think this is really getting to the heart of our position, is that there is being somewhat, maybe unintentionally, a double standard being applied here. And I think it came out here loud and clear.

To just address a couple of comments from Mr. -- I'm sorry, the name escapes me, -- the legal counsel for the Staff, he mentioned that -- and about several times during his presentation -- that the Notice of Auction required legal rights.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

Nowhere in the Notice of Auction does it say that site control shall be only provided and can only be done via the establishment of a legal right. The word "legal right" is never even used. So he meant maybe what you wanted -- maybe that's what you meant to say, but your actual Notice of Auction says, and I'll quote it again because I think it's really important to know what it is you asked your bidders to do, through your own documents, that "the bidder shall provide evidence that the location proposed can be used... and is available to be owned or controlled." I think that is a far cry -- up there we are -- that is a far cry from -- a reliable microphone -- I think that is a far cry from the term "legal rights" that legal counsel used I think three times in his presentation.

If you are looking for irrevocable legal rights and not evidence that's available, you should have said that in your Notice of Auction.

Contrary to, and I'm not sure -- I didn't write here who had made this statement -- either Mr. Tutt or legal counsel said the BLM decision letter and the conditions contained in that letter contained as provided in our bid, our March 26 letter, could be given to "anyone who was inquiring about right-of-way grants."

That's categorically untrue. You need to submit an application, a Form 299 and provide various documents and site plans for the BLM to do a review of your project, and provide

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

what is styled, and I what I want to emphasize, is styled as a decision letter. It's not a form you pick up at the rack at the front of the BLM lobby that says here are the things you have to do.

We had to have a detailed submittal or, in our mind, a detailed submittal that was reviewed by BLM for many months. We had many meetings with them. And this so-called decision letter is specific to this particular project.

There seems to be some confusion about whether we have withdrawn our application and whether we asked for an extension. And I believe the Commissioner earlier pointed out that our bid package contained a written request to the BLM to allow us additional time beyond the 30 days to submit the list of information and engineering work that they wanted.

And so we did make that request, and we provided that request in our bid application -- in our bid submittal. And it was part of our bid package that was reviewed by the Staff.

We had not withdrawn our application. In talking with the BLM, and I won't go through the details of it because it does involve two projects, actually three projects. Mr. Tutt is correct. There was some discussion with BLM about including a joint environmental review with the County of Riverside for a private land project and the federal government for the public land project, which would have involved multi agencies. You've got three projects here that are somewhat intertwined, not

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

intentionally, but BLM has elected to try and do a joint environmental review.

And so our revised submittal, which will be a detailed submittal, will come as a result of discussing with BLM the proper form that these projects should be laid before them.

As I mentioned, we have done a FERC application and have submitted that to Washington. That was required after this letter and after further discussion with BLM. We haven't withdrawn it. We have taken the time to find out precisely what will be required with BLM so, when we do make a submittal, it is a complete submittal that can be processed timely. So there has been no formal or informal withdrawing of the application.

I think Mr. Tutt indicated, or, again I'm sorry, it may have been counsel because I was writing here quite quickly -- it was a comment made by Staff, let's say -- that they would have looked at our bid package differently had we resubmitted an application and it was in the process.

I don't know why they would have looked at it differently because it still would not have granted the legal rights that legal counsel has said several times they were looking for. That legal right can only be afforded the bidder through a fully issued right-of-way grant, which comes out after all the environmental review is done. And that does take approximately a year, according to BLM, to do that process.

And we are in an area of the Desert Tortoise, which is

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

an Endangered Species under federal law, and that's mentioned in the decision letter. And those processes take time. These legal rights that they purportedly seek would not have been granted to us simply by resubmitting all this data, even if we could have put it together in the 30- or even 60-day period prior to the date the bids were due at the CEC.

Counsel indicated the project has been delayed, and there is some potential for missing milestone number one. And I am, frankly, as well as Foras Energy, are baffled as to what this means.

Milestone number one is the product award package. And the product award package identifies all of the permits that are needed. And the very bid itself indicated -- the bid package -- excuse me -- the Notice of Auction itself indicates the Commission is earmarking something like 18 months for processing of permits, which fits right in the one-year timeframe that I'm representing to you BLM told us that our right-of-way grant application would take since the right-of-way grant application, in effect, is the permit process that one would do on private land.

So the project is not delayed. And there's now some fear of milestone number one being missed. Milestone number one can be handled with the same dispatch as any of the other projects that you have or all the projects that you have that require the various documents and permit identifications for a

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

projects award package.

Mr. Tutt indicated -- I think I already stated this -- that Ms. Kuizon of BLM had told him we had not asked for an extension of our application, and the letter in our bid package I have referenced earlier is addressed to Ms. Kuizon. So I'm a little bit baffled as to where the confusion -- what the source of the confusion is here.

Once again, without knowing the precise nature of the right-of-way grants referred to in your other bid packages, I can only assume that they're either decision letters, which I believe they probably are based on Mr. Tutt's testimony or they're right-of-way grants that have been issued after a submittal of an application many, many months, if not years ago, knowing how long these right-of-way grants' applications take.

And so if there is a right-of-way grant application -- excuse me -- a right-of-way grant that has been issued for one of your winning projects, and that's considered site control, that is only because that bidder some number of years prior to the Notice of Auction even being issued, much less discussed at the Staff level and the CEC Commission level late last year and early this year -- the point I'd like to make is that the potential inadvertent discrimination that is happening here is that a new project on federal lands that's starting from scratch and filing an application with the BLM is being precluded from submitting a bid at this Auction based on the interpretation

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

given by Staff as to what "site control" means, because you can't have a legal right without an issued right-of-way grant, and that takes approximately a year.

So with the Notice of Auction being issued March 31 and bids due June 5th complete with bid bonds, et cetera, et cetera, it's obviously impossible for any new project on federal lands to qualify for this Auction. And I don't believe that was the spirit and expressed intent of this Auction, both through prior hearings as well as the documentation for the Auction itself.

Finally, with regard to the confusion about the right-of-way grants and that we were going to provide a letter. Apparently BLM did get confused upon telephone calls from Ms. Lee of Mark technologies.

Mr. Tutt, as well as our permitting consultants, they process hundreds of these. And we currently have one in process for an access road on private land. And I think there was some confusion about the right-of-way grants here. But we had hoped to get something from the BLM that would indicate some sort of an extension. Their response to us was simply: Resubmit your application with all the required information; that's the best way to move this process forward.

With respect to the Petitioner's rebuttal to the CEC Staff statement, we have prepared a written rebuttal. We apologize for it being presented only at the beginning of today's hearing, but we didn't receive this until the day before

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

yesterday ourselves. And we needed the time to review Staff's position and prepare this.

I think some of these issues may have come out in my prior comments. So I could either read this into the record, if that's what's required, or if just presenting here and hoping the Committee Members will read our Rebuttal, I won't take up the time to go through each of these in detail. But I am happy to --

PRESIDING COMMISSIONER MOORE: Mr. Jones, I might just add that we have read everything that's come before us. We will read this in the context of the remarks we have heard today and consider all of this prior to making any decision. So the fact you have submitted it and you have summary testimony in addition to our questions will be taken into account as a part of our decision. I don't know there's a need to read it into the record.

MR. JONES: Okay.

COMMISSIONER SHARPLESS: Could I just ask a question?

MR. JONES: Sure.

COMMISSIONER SHARPLESS: You submitted a letter to BLM asking for the extension. And I believe your testimony says you now have resubmitted your application package. Is that correct?

MR. JONES: We have submitted the package requested

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

by the BLM that goes to FERC for the other portion of this two-prong project. There's also two projects involved in this decision letter.

COMMISSIONER SHARPLESS: So not the one that's Number V, but some other part of the project?

MR. JONES: Yes. The pump storage hydro portion package has been prepared and submitted to the FERC in Washington as requested by BLM, who asked us then to come back with a separate right-of-way grant following FERC's review.

The submittal of the revised application for the wind-energy portion only is in preparation now and should be filed with the BLM during the month of September.

MS. GEFTER: So with respect to the letter dated April 21st from Skidmore Energy to BLM, which is the request for an extension of 60 days, --

MR. JONES: Yes.

MS. GEFTER: -- what was BLM's response to that letter?

MR. JONES: Well, they do not provide a written response, but they provide a verbal response, which, in summary, said that "We would like you to seek FERC approval of your hydro project. So please provide with the FERC and get their input before you involve our office. We're very busy. So since FERC's needed, let's get FERC involved."

And, "Secondly, resubmit or make your resubmittal of

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

all the required engineering work and plans of operations that we have listed there. That's the most efficient method of proceeding with it. Granting you an extension is not going to afford [us] any faster track" in our application. So they just, at their request, asked us to split this into two pieces. Go to FERC with Piece A and come back to them with Piece B.

PRESIDING COMMISSIONER MOORE: Thank you.

Ms. Lee, do you have items?

MS. LEE: No, thank you.

PRESIDING COMMISSIONER MOORE: Thank you very much.

All right. Staff, I offer you an opportunity to rebut the comments you have heard.

MR. HERRERA: Thank you, Commissioner Moore. I think I will go first and then Tim Tutt, I'm sure, has a couple questions and responses as well.

Concerning the double standard that Mr. Jones raised concerning Staff's evaluation of the bids, doing some as ownership interests or legal rights and viewing theirs as not, I think what Tim was referencing when he said some of the other bidders identified their right-of-way grants from BLM as a lease is in the sense they were paying a fee to use that property. And that fee is identified in Exhibit 8.

In the package submitted by Petitioner is a sample grant right-of-way. Article Number 3, Rental, identifies the

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

payment of fees to the Bureau of Land Management.

The subsequent document also identifies cost reimbursement, 3 a. So I think what's happening here is they identified this thing as a lease in their bid because it appeared what they had obtained was lease like, and that's fine. I don't think we're going to elevate substance over form here -- or, excuse me -- form over substance. We wanted individuals to identify in the form the property interest they possessed. And if they characterized it as a lease and subsequently explained it, that was fine.

Concerning the legal rights. If you look at the decision letter that Petitioner received, that was the March 26 letter included as part of the bid package in Exhibit 8, I view that as standard response. It's not binding. It's not binding on either Petitioners or on BLM. It just directs them to provide additional information so BLM can start the processing.

And it occurs to me if they had submitted that additional information that BLM might provide an additional response indicating to move forward. If it is as Petitioner suggests then there could be a half dozen people applying for the same plot of land only to find out which one gets it at the very end after they submitted their environmental documents and all the other information. That can't be correct. There has to be some interim process that gives a party who has applied to BLM a right to move forward, a secure right knowing there is no

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

other competing interest for the same plot of land. If not, it would be a waste of that applicant's money and time.

Concerning the missed milestone. What I want to get to is the fact that this Agency is not unreasonable. If, at the end of milestone one, it appears an applicant or bidder has not completed everything they were supposed to because of situations which were outside their control, I'm sure we would take that into consideration in terms of taking action on their bid bond.

So with respect to this situation with Petitioner, where we know in advance that they haven't secured any sort of rights with BLM to use this property, that's one more thing they're going to have to do. And it's going to make it more difficult and less likely for them to complete milestone Number one.

It basically puts us on notice there's a chance they might miss milestone number one on time, and so make our action of forfeiture on the bid bond less reasonable. That was the point I was trying to raise.

I think Tim might have some additional comments.

Tim.

MR. TUTT: Yes. With regard to the other bids that I mentioned in my earlier -- that were on BLM property, at least in the ones that I have just looked at, the decision letter is a decision to assign or amend an existing right-of-way grant.

So in those cases the right-of-way grant was there.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

The process had gone through. It's just a decision that BLM gave to bidder indicating that now bidder was the legal entity that the BLM was assigning or associating with that particular property and right-of-way grant.

I do apologize for the earlier statement that the Petitioner had not filed an extension. I remember, now looking at this and seeing this letter, and, in fact, that was I think what triggered, in some cases, some of my calls. I have a note in my Declaration that Patricia Lee called and left a message on my phone stating that BLM did not grant extension as requested. And I remember now that was referring to this letter asking for this extension.

It also suggests in her message to me that BLM gave verbal commitment that land was available to her and said that Mark Technologies was waiting to refile their application until they found out about Auction results. And those were my notes of the message Patricia Lee left on my phone on July 6th.

It was, I believe, Lucia Kuizon, when I talked to her, that used the word "withdrawal" of the application. It was never clear to me exactly what that meant from her perspective, because it did not seem or at least I did not receive at any point any written confirmation that an application had been withdrawn.

Gabe has already talked about the question of whether this is a lease. I don't want to get down to arguing what a

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

lease or a rental is. I just was indicating the other bidders had shown or indicated in their forms that it was a lease.

And Mr. Herrera has noted there is a rental statement included in a right-of-way grant. And presuming it's a fair-market value rent, I don't know exactly what that would be, but other bidders may have interpreted that as "This is where we should check one of those three boxes. It's most appropriate to check this as a lease."

I think that's all I have in rebuttal at the moment.

MR. HERRERA: Can I add just one more thing, Commissioner Moore and Commissioner Sharpless?

And that is the dates, when you look at the dates on the application in the decision letter from BLM, they got that letter, it was dated March 26, almost a month before the pre-bid conferences. And certainly their response back to BLM asking for an extension was on April 21st.

I'm just wondering why they didn't take an opportunity during the pre-bid conference that they claim they intended to raise the issue, to throw it out there for everybody else. I mean that was the proper forum to flush out all these issues concerning site control or any of the other eligibility requirements so that we could deal with them productively.

PRESIDING COMMISSIONER MOORE: Well, I think, Mr. Herrera, in fairness to the Petitioners they did state at the opening of this that they simply didn't see that there was a

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

need, --

MR. HERRERA: Right.

PRESIDING COMMISSIONER MOORE: -- that they interpreted as encompassing that. So I think in fairness to them I think they have addressed that point.

MR. HERRERA: Okay.

MS. GEFTER: Mr. Tutt, just one other question. You indicated that other bidders where there was already an existing right-of-way grant to the particular land where they wanted to do the project; and they just got BLM to approve their interest in that particular right-of-way. That's how you distinguished those other bidders from this particular Petitioner's bid.

MR. TUTT: Well, those are the details of it. I mean what I was looking for, as I was going through this, was evidence that the bidder had achieved some legal right, some leasehold, some ownership, some contingent option even to exclusively use that site as proposed. And I considered that letter granting them an amendment and assignment of an existing right-of-way grant to satisfy that condition, in my mind.

PRESIDING COMMISSIONER MOORE: Thank you.

Staff, Commissioner Sharpless, do you have any questions?

MR. MASRI: I have a clarification question, Commissioner Moore, if I may.

PRESIDING COMMISSIONER MOORE: I'm sorry. Marwan.

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

MR. MASRI: Could you, for the record, tell us who made the verbal response to the April 21st letter and to whom and what date was that?

MR. JONES: Who is this being addressed? Is this being addressed to --

PRESIDING COMMISSIONER MOORE: I assume it's being addressed to the Petitioners.

You're --

MR. MASRI: Yes.

PRESIDING COMMISSIONER MOORE: -- addressing Mr. Jones?

MR. MASRI: You indicated there was a verbal response from the BLM to your request for an extension. And that response effectively said there was no need for such an extension.

PRESIDING COMMISSIONER MOORE: Mr. Jones, in your statement you said you called BLM and they said, "Look, no need to try and give an extension. What you need to do is resubmit your entire package."

I think what Mr. Masri is referring to is can you remember who you were talking to?

MR. JONES: Well, I didn't have that contact. Our environmental consultant, Anthony Skidmore, the one referenced in the extension letter, has the day-to-day contact with BLM. And he recounted these conversations to me that he has. And

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

there is an ongoing battle even today with the BLM. It's an ongoing process.

PRESIDING COMMISSIONER MOORE: Okay. Thank you.

All right. With that I'm going to turn back to the Petitioners and say in terms of the procedures we have outlined we need to follow here to get this case before the Committee, let me ask you if you have any closing remarks you would like to make to us?

MR. JONES: Just a couple. One, I encourage you to read our rebuttal. I think some very important issues are being raised by the Staff and their comments that are directly addressed in our rebuttal. But I wanted to point out one, in particular, that keeps coming up.

Mr. Tutt just said the same thing, that when they were reviewing bid packages they were looking for secured legal rights. And this, to me, is a post-Auction change. It really is the essence of this hearing, I believe. They were looking for this.

And I just want to, at the expense of being didactic and repetitive, want to repeat what the Notice of Auction requirements are. They are not demonstration of secure legal rights. It is, and I quote, "Evidence that the location proposed can be used as proposed and is available to be owned or controlled." That is not the same as a secured legal right.

And there are a couple of items that were addressed in

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

our written rebuttal, and I will not repeat them, only to encourage the Committee to read those comments. But I think we have probably covered all that we need to.

Thank you for the opportunity.

PRESIDING COMMISSIONER MOORE: Thank you, sir.

Closing comments from Staff?

MR. HERRERA: Just one point, and I hit it before.

I think the Petitioners are looking at a select group of words and are kind of dancing around the issue or they're focusing on the words "available to be controlled," when clearly by examples and by our responses at the pre-bid conference what we are looking for is the legal right. I mean clearly if someone does not have an ownership interest, a leasehold interest or an irrevocable option that's not legal in the sense of a right to control. And that's really what we were after.

MR. TUTT: Just to make that point one more time.

The language that Petitioners keep reading are talking about "available to be" -- "used as proposed.. [or] owned or controlled by the bidder or affiliated parties," I mean that statement does have a footnote attached to it. And that footnotes says "A contingent option to purchase or lease... is sufficient for establishing ownership availability."

I would interpret that as meaning if you actually owned it or leased it, that's more than you would have needed to do. The minimum that we were asking for in this case was some

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

contingent option, a legal option.

We're not using the word "legal," but that's the implication to me, that contingent upon winning the option is what I would interpret that word to mean, "You will purchase or lease this location. Contingent on a certain period of time I have the exclusive right to purchase or lease this location." We felt that was sufficient.

We didn't want somebody to go out and actually buy a piece of property and then lose the option and potentially lose that amount of money or cost. We felt it was sufficient for them to have an option to buy that property. We were willing to go that far.

Further on in the questions and answers that were distributed as part of the Notice of Auction, and I would reiterate that we have to take all of the words and consider them together, and, in particular, Question 43: "Is site control required?" And the answer is "Yes." "See answer to next question."

Question 44: "Is it acceptable to have site control contingent upon acceptance of award." The answer is "Yes." In that case you would mark the third box, exclusive and irrevocable option.

So I think if you look at all the words in the Notice of Auction as it went out, it was clear, at least in our minds. What we were looking for was evidence that that location, a

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

project location, could be exclusively -- that the bidder had an exclusive right to use that location as proposed.

PRESIDING COMMISSIONER MOORE: Thank you.

Let me just say then, for the record, the Committee has considered the written documents that have been placed before us. We have heard testimony today from Staff and from the Petitioners, and we will consider those. We won't consider anything else other than this documentary record. So it is on this that we will base our decision.

Within 30 days, following this hearing, we will prepare and distribute a written decision to everyone.

If, for any reason, the Petitioner disagrees with that decision, you have the opportunity to appeal to the full Commission, the full Energy Commission, pursuant to Chapter 6 of our Overall Guidelines.

And with that I'm going to say if there are no other comments, public comments, and let me ask if there are?

(No response.)

PRESIDING COMMISSIONER MOORE: None. The hearing is now adjourned, and the record on which we base our decision is now closed.

Thank you for coming.

MR. JONES: Thank you.

(Whereupon, the hearing was adjourned at 11:54 o'clock a.m.)

Renewables Committee Meeting on Reconsideration of Denial, August 21, 1998

---o0o---

CERTIFICATE OF REPORTER

I, **GEORGE PALMER**, a duly-commissioned Electronic Reporter of **Palmer Reporting Services**, do hereby declare and certify under penalty of perjury that I have recorded the foregoing Public Hearing by the **Renewables Program Committee** on the **RECONSIDERATION OF FUNDING AWARD DENIAL UNDER NOTICE OF AUCTION 500-97-506**, which was held and taken at the **STATE of CALIFORNIA ENERGY COMMISSION**, in Sacramento, California on the **21st day of August 1998**.

I also declare and certify under penalty of perjury the aforementioned public hearing was transcribed by Susan Palmer, a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Number 000124, and proofed by Nancy Palmer, Number 000121; and that the foregoing pages constitute a true and accurate transcription of the aforementioned public hearing.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in the outcome of said hearing.

Dated this **24th day of August 1998** at Manteca,
California.

GEORGE PALMER

ELECTRONIC REPORTER



August 20, 1998

Commissioner Michal C. Moore
Commissioner Jananne Sharpless
Renewables Program Committee
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5504

Re: Docket No. 98-REN-NEW
Petition for Reconsideration Filed by Mark Technologies Corporation/Foras Energy Inc.

Dear Renewables Program Committee:

We respectfully request that this joint statement of CalWind Resources, Inc. ("CalWind") and Whitewater Energy Corporation ("WEC") be read into the record at the above referenced Renewable Program Committee ("Committee") public hearing being held in Hearing Room A at the California Energy Commission ("CEC") on August 21, 1998 at 10:00 AM.

**JOINT STATEMENT OF CALWIND RESOURCES, INC.
AND WHITEWATER ENERGY CORPORATION**

We are participants in the CEC's New Renewable Resources Account auction ("Auction"). Our bids fully complied with the Auction requirements, including demonstrating site control as defined in the Auction materials. Our bids have been granted conditional funding awards pursuant to the Auction results. Should the Renewable Program Committee ("Committee") grant the Petition for Reconsideration ("Petition"), our conditional funding awards will be reduced and/or canceled. Consequently, we have a substantial interest in the outcome of this hearing.

We respectfully request that the Committee deny the Petition for the following reasons.

First the Petitioner has failed to demonstrate that its Alta Mesa Project - Phase V bid ("Bid") demonstrated site control as required in the Auction materials. In fact the Petition, establishes just the opposite. After classifying the Bid as a new wind project on BLM property, the Petition states that new projects on BLM property are unable to obtain site control (as stated in the Bid Package) because the BLM only issues such 'leasehold' interests through a Right -Of-Way Grant. The Petitioner did not even file a complete Right-Of-Way Grant Application with the BLM.

00-10-00 21703 0004751700 CALWIND RESOURCE 03

Second, the Petitioner argues that the site control demonstration requirement discriminates against new projects on BLM property and therefore that requirement should be modified. This argument is untimely. Any concern of discrimination should have been raised with the CEC prior to the close of the Auction. As the Commission Staff's Position Statement articulates there was ample opportunity for this issue to be brought to the Commission's attention. This would have allowed the Commission to address the issue at a time when all participating parties and those that otherwise would have participated could all benefit from a Commission modification of the Auction requirements.

To change a rule now after the fact will cause damage to those parties who bid in accordance with the rules and damage those parties who would have otherwise submitted a bid under the rules as so modified.

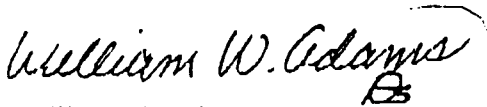
Any retroactive modification of the site control demonstration requirement will benefit only the Petitioner.

In conclusion, we fully support the Commission Staff's Position Statement and respectfully request that the Committee deny the Petition and leave the funding awards undisturbed.

Respectfully Submitted



S. Douglas Levitt
President
CalWind Resources, Inc.



William W. Adams
President
Whitewater Energy Corporation



Robert A. Nelson, General Manager-Chief Engineer

August 20, 1998

Susan Geftter, Hearing Officer
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Dear Ms Geftter:

I am writing as a follow up to my phone call to Connie Bruins and Gabe Herrera this afternoon. We received the FAX notification of the appeal hearing about 2:30 p.m. today. Unfortunately, I am unable to attend on such short notice, but respectfully request that you read into the record the letter from our County Counsel dated August 12, 1998 attached hereto which clearly explains our position and concern over the potential for eliminating our projects which have already been tentatively approved. We respectfully request the appeal before your Commission not result in any action which eliminates our approved projects.

Sincerely,

A handwritten signature in dark ink, appearing to read "Robert A. Nelson". The signature is fluid and cursive, with the first name "Robert" and last name "Nelson" clearly distinguishable.

Robert A. Nelson
General Manager-Chief Engineer

RAN:mfa

Attachment

cc: Connie Bruins (FAX 916-653-8251)
Gabe Herrera (FAX 916-654-3843)

OFFICE OF COUNTY COUNSEL COUNTY OF RIVERSIDE

WILLIAM C. KATZENSTEIN
County Counsel

JOE S. RANK
Assistant County Counsel

ROBERT M. PEPPER JR.
Principal Deputy

3535 TENTH STREET, SUITE 300
RIVERSIDE, CA 92501-3674
TELEPHONE: 909/955-6300
FAX: 909/955-6322 & 955-6363

JUVENILE COURT OFFICE
9991 COUNTY FARM ROAD, SUITE 113
RIVERSIDE, CA 92503
TELEPHONE: 909/358-4125
FAX: 909/358-3407

DEPUTIES

GERALD BLANKENSHIP JR.
FRANK C. ALDRICH III
TIMOTHY J. DAVIS
JAY G. VICKERS
MICHAEL D. ELLIS
DOROTHY L. HORN
KATHERINE A. LIND
JAMES I. BRZYTTWA
PAMELA J. ANDERSON
LEE A. VINOCOUR
GORDON V. WOO
BEAUFORD T. MILLER JR.
KARIN L. WATTE-BAZAN
WILLIAM D. KENISON
MARSHA L. VICTOR

WILLIAM A. JARVIS
NEAL R. KIPNIS
CAROLE A. NUNES
LUCY J. FURLITA
LISYA M. McGUIRE
LILIA WILKERSON
ROBYN A. ROGERS
TANYA E. GALVAN
SHERVAN S. ACOSTA
PATRICIA SMITH
CAROL D. PEREZ
KIMBERLY FORTER
DAVID H. SCHUFF
MICHAEL C. FUENTES

August 12, 1998

Michal Moore
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Attention: Tim Tutt

RE: Re-classification of Bids for the Mead Valley, Double Butte, Coachella and Lamb Canyon landfill Gas-to-Energy Projects in the Notice of Auction- New Renewable Resources Account RFP #:500-97-506.

Dear Mr. Moore:

This office represents the County of Riverside and the Riverside County Waste Management Department regarding the referenced matter. The Riverside County Waste Management Department (RCWMD) intends to appeal any decision made by the Commission to re-classify the Mead Valley, Double Butte, Coachella and Lamb Canyon Landfill gas-to-energy projects as losing bidders, on the grounds that the Commission's Renewable Guidelines, as delineated in the Notice of Auction, were not followed.

On July 9, 1998, in a news release, the Commission conditionally approved the Mead Valley, Double Butte, Coachella, and Lamb Canyon landfill gas-to-energy projects as auction winners. Since this news release, RCWMD staff has spent well in excess of one hundred hours preparing critical path scheduling plans, modifying Solid Waste Facility permits, and developing emission modeling for these four sites.

The RCWMD was verbally informed, without written notification, on July 29, 1988, that another project is appealing it's losing bid status, and that if the appeal is upheld that four of the RCWMD projects would be re-classified as losing bidders and another two of the approved projects would lose 8% of their funding. If this appeal is approved the RCWMD would lose

OFFICE OF JUVENILE
SITE MANAGEMENT
AUG 14 PM 12:15

Michal Moore
California Energy Commission
August 12, 1998
Page 2

\$1,903,000 in funding. In addition, revenues (\$1,250,000) from Federal Section 29 Tax Credit transactions may be lost due to the "losing bid" status of two sites that were to be bundled with another site to make these Credits more appealing to the private sector.

It is the RCWMD's understanding that the appeal from the losing bid was a result of an inability to provide site control as required with the application. It is our opinion that each bidder had equal information and opportunities to meet the CEC's site control requirements. All bidders were given clear instructions on what the Auction required for proof of site control, and the CEC also clearly stated that insufficient information would be grounds for disqualifying a bid.

Page 14 of the Notice of Auction states that the "bidder shall provide evidence that the location can be used as proposed and is available to be owned or controlled by the bidder or affiliated parties." The CEC also stated that a contingent option to purchase or lease the location was sufficient proof of site control. Page 3-1 of the bid form itself, specifies that the bidder must demonstrate to the CEC that he/she or affiliated parties have site control.

Furthermore, in the transcript from the April 21 Pre-Bid Workshop, the CEC states in the answer to Question 43 that "a proposed project may be disqualified from the auction ... if there is insufficient information in the bid to determine whether an identifiable project is being proposed and determine whether that project, as proposed, is eligible and being described truthfully." The transcript goes on to unequivocally state in the answer to Question 43 that site control is required.

Again, it is our opinion that each bidder, including the losing bidder, had equal information, time, and opportunity to meet the CEC's site control requirements. The CEC was more than generous in giving numerous deadline extensions and very clearly stating in the Guidelines of the Notice of Auction the information that would be required to demonstrate site control.

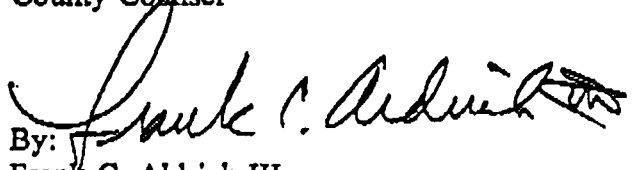
It is clearly stated in the Notice of Auction, that the announcement of the Auction bid winners does not guarantee payments to winners. The Commission's Renewable Guidelines, as delineated in the Notice of Auction, provide that the announced auction winners could be re-classified as losing bidders if the project lost its eligibility status or could not meet any of the milestones. However, the Notice of Auction does not state that a project's status could be re-classified due to a subsequent appeal by another entity.

Michal Moore
California Energy Commission
August 12, 1998
Page 3

For these reasons, the RCWMD will very probably appeal any decision that re-classifies these four projects as losing bidders, on the grounds that the Commission's Renewable Guidelines, as delineated in the Notice of Auction, were not followed. We urge the Commission not to re-classify the previously approved projects of RCWMD.

Very truly yours,

WILLIAM C. KATZENSTEIN
County Counsel

By: 
Frank C. Aldrich III
Deputy County Counsel

FCA:db
cc: Robert A. Nelson (RCWMD)
Terry Hagen (RCWMD)
Mark Hunt (RCWMD)